

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MICHAELA A. WIGLESWORTH and DEPARTMENT OF VETERANS
AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER,
Kansas City, Mo.

*Docket No. 95-2995; Submitted on the Record;
Issued January 13, 1998*

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant had no loss of wage-earning capacity based on her actual earnings as a medical instrument technician.

On October 13, 1993 appellant, then a 40-year-old medical instrument (electrocardiogram) technician, sustained a lumbar strain in the performance of duty.

In a disability certificate dated August 12, 1994, Dr. Chris J. Maeda, a Board-certified orthopedic surgeon, indicated that appellant could return to her regular duties as a medical instrument technician with the exception that she should minimize prolonged walking.

In a letter dated May 19, 1995, the employing establishment advised the Office that appellant had been assigned to a position with work hours of 6:00 a.m. to 2:30 p.m. because it was not possible to find an evening position for appellant and therefore she was not receiving the 3.5 hours of night differential pay which she had received previously.

In a claim form dated May 12, 1995, appellant filed a claim for loss of wages due to loss of night differential pay that she was no longer receiving because of a change in work hours. On the reverse of the claim form, an employing establishment representative indicated that appellant had been working from 1:00 p.m. to 9:30 p.m. prior to May 7, 1995 but that her work hours had been changed in an effort to place her in a permanent position within her work restrictions and she was therefore no longer receiving 3.5 hours of night differential per pay.

By decision dated August 9, 1995, the Office advised appellant that it had determined that she had sustained no loss of wages due to her loss of night differential pay. The Office stated that it had compared appellant's pay rate in effect on the date of her last disability (January 23, 1995), the current pay rate for the job held on the date of injury (October 13, 1993),

and her current wage-earning capacity. The Office stated that when these figures were entered into the formula used to determine wage-earning capacity, the results indicated that appellant had no loss of wages. The Office stated that no benefits were due for loss of night differential pay as her current earnings of \$410.00 per week exceeded the current pay rate (including night differential) of her date-of-injury job, \$401.96. The Office provided a copy of the worksheet used in calculating appellant's wage-earning capacity according to the principles set forth in *Albert C. Shadrick*, 5 ECAB 376 (1953).

The Board finds that the Office properly determined that appellant had no loss of wage-earning capacity based upon her actual earnings as a medical instrument technician.

Once the Office has made a determination that a claimant is totally disabled as a result of an employment injury, it has the burden of justifying a subsequent reduction of compensation benefits.¹ The Office has met its burden in this case.

Under section 8115(a) of the Federal Employees' Compensation Act,² wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent her wage-earning capacity.³

In the present case, appellant had actual earnings as a medical instrument technician but stopped receiving her night differential pay when her work hours were changed in May 1995. However, the evidence of record shows that appellant, in her current daytime position, was receiving a weekly pay rate substantially equal to or greater than the position held at the time of her injury, even taking into consideration the loss of night differential pay. The Office thus properly determined that appellant had no loss of wage-earning capacity.⁴ The Office properly used appellant's actual earnings as the basis for her loss of wage-earning capacity.⁵ Generally, wages actually earned are the best measure of a wage-earning capacity, and, in the absence of evidence showing they do not fairly and reasonably represent the injured employee's wage-earning capacity, must be accepted as such measure.⁶

The Office, therefore, properly determined that appellant had no loss of wage-earning capacity based on her actual earnings as a medical instrument technician.

¹ *Harold D. Snyder*, 38 ECAB 763, 768 (1987).

² 5 U.S.C. §§ 8101-8193.

³ 5 U.S.C. § 8115(a).

⁴ See *Richard M. Knight*, 42 ECAB 320 (1991). Disability is defined in the implementing federal regulations as "the incapacity, because of employment injury, to earn the wages the employee was receiving at the time of injury." 20 C.F.R. § 10.5(a)(17). The Office applied the principles enunciated in *Albert C. Shadrick*, 5 ECAB 376 (1953), and determined that appellant's current pay rate for the date-of-injury position (including night differential pay) was \$401.96 per week and that appellant's current position paid \$410.00 per week which results in no loss of wage-earning capacity.

⁵ See 5 U.S.C. § 8115(a); 20 C.F.R. § 10.5(a)(17).

⁶ *Clarence D. Ross*, 42 ECAB 556 (1991).

The August 9, 1995 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, D.C.
January 13, 1998

David S. Gerson
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member